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UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

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NOTICE OF PROPOSED RULEMAKING

FLIGHT OPERATIONAL QUALITY ASSURANCE PROGRAM

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DOCKET NO.	FAA-2000-7554-9	[]
FAA NOTICE NO.	00-071	[]
ISSUED	June 29, 2000	[]
65 FED.REG. 41527 et. seq.; July 5, 2000		[]
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COMMENTS ON FAA NOTICE OF PROPOSED RULEMAKING
CONCERNING
FLIGHT OPERATIONAL QUALITY ASSURANCE PROGRAM

These comments are being provided to the FAA in response to the regulatory docket identified above, specifically the Notice of Proposed Rulemaking issued by the FAA (hereinafter NPRM) concerning Flight Operational Quality Assurance Program (hereinafter FOQA).

For all of the various reasons set out in detail below and as clearly and unequivocally demonstrated by these comments, there is no basis in law or in fact which supports or justifies this proposed regulatory action by the FAA. To the contrary, it appears that this NPRM improperly, and perhaps illegally, interferes with the legal obligation of air carriers. In addition, the proposed rule is so vague and ambiguous that it fails to provide clear regulatory criteria or standards capable of being complied with. It also appears that the NPRM tried to apply an extra-legal / illegal gimmick in order to circumvent and avoid the requirements of the Administrative Procedure Act by engaging in 'regulation' by reference to an as yet non-existent advisory circular and/or unknown agency memoranda. Finally, as demonstrated by the preamble of the NPRM itself, there is no factual basis for this proposed rule, and at best the FAA is being disingenuous, if not duplicitous.

I. The NPRM Lacks a Valid Legal Foundation:

With respect to the FAA's statutory authority to promulgate regulations, the law is clear and unambiguous. Specifically, the FAA is authorized and directed by 49 U.S.C. 44701 to:

> **promote safe flight of civil aircraft in air commerce by prescribing – (1) minimum standards required in the interest of safety ....; and (5) regulations and minimum standards for other practices, methods, procedures the Administrator finds necessary for safety in air commerce ..... [49 U.S.C. §44701(a)]**
> and in
> **49 U.S.C. §44701(b) – The Administrator may prescribe minimum safety standards for - (1) an air carrier to whom a certificate is issued under section 44705 of this title;**
> [Emphasis Added]

The FAA does not have the power to issue regulations just because the agency may feel would be or could be useful or might provide the agency with better information. **The FAA is only empowered to issue regulations which establish 'minimum standards required in the interest of safety.'** It is clear that in order for any regulatory action by the FAA to have a valid legal foundation this statutory standard must be satisfied. It is also clear that this NPRM does not meet this standard.

Nowhere in this NPRM there is any indication that this proposed regulation is necessary as a 'minimum standard required in the interest of air safety.' What the FAA indicates in the NPRM is that the FAA believes that "the information obtained from aggregate FOQA information would be used to provide an improved basis for agency decisions based on objective data from line operations." and "Periodic reviews of trends and lessons learned from the FOQA program will help both the airline and FAA inspectors decide where to concentrate future safety efforts." Then, after going through an illustrative list of various already achieved operational benefits based on existing FOQA programs, ranging from improved fuel management to detection of out-of-trim conditions, the FAA indicates that "These results clearly validate the value of FOQA for both safety enhancement and cost management purposes."

Accepting the foregoing characterizations by the FAA as true and acknowledging that FOQA can be a very useful tool for obtaining a great deal of information about various aspects of flight operations does not mean that control over FOQA is within FAA's regulatory grasp. Just because a number of benefits can be derived using FOQA is not a sufficient basis for FAA to regulate or control FOQA. This NPRM which would require obtaining FAA approval of FOQA programs does not meet or even come close to the

statutory requirement of section 44701(a) for a regulation --- **"minimum standards required in the interest of safety"... [49 U.S.C. §44701(a)]**

There is no doubt that FOQA is a useful tool. However, there are other very useful tools which, like FOQA, are not required by any regulations and are not part of FAA's minimum standards, but tools which nevertheless enhance aviation safety -- e.g., optional systems available on some modern jet transport airplanes enable real-time communication between a flight crew and technical personnel located at a distant ground facility, including the ability of the ground technical personnel to receive and monitor various cockpit instruments on a real-time basis, and use that information in providing assistance to a flight crew dealing with an in-flight anomaly.

More significantly, **as noted in the NPRM, FOQA is a voluntary program**. No air carrier is required by any FAA regulation to have a FOQA program. Not every air carrier holding an FAA certificate has chosen to have a FOQA program. All air carriers holding an FAA certificate are required to have: flight data recorders [14 CFR §121.343]; cockpit voice recorders [14 CFR §121.359]; traffic alert and collision avoidance / TCAS systems [14 CFR §121.356]; airborne weather radar [14 CFR §121.357]; low altitude windshear detection equipment [14 CFR §121.358]; ground proximity warning systems [14 CFR §121.360]. **However, there is no regulation that requires any air carrier to have a FOQA program. To the contrary, and in fact as the FAA indicates in the preamble to this NPRM, "the implementation and continuance of FOQA programs by airlines would be voluntary."**

The voluntary nature of the FOQA program means that FOQA is not required by any FAA regulation. Unlike the extensive data and other reports already required to be submitted to the FAA under 14 CFR §121.703, FOQA could cease to exist and there would be no breech of any FAA regulation. Since FOQA is voluntary and not required by FAA, it constitutes a program that is independent of and not within the scope of FAA's regulatory reach. The statutory criteria for an FAA regulation is **'minimum standards required in the interest of safety' or 'minimum standards necessary for safety in air commerce.' [49 U.S.C. §44701(a)]** As a voluntary program, the implementation and continuance of which is a matter of discretion on the part of individual air carriers, FOQA programs are not within the statutory criteria of '**minimum standards required or necessary for safety in air commerce"** which is the foundation of any FAA regulation.

On its face the NPRM would apparently only apply to the operator of an aircraft who operates under an FAA approved FOQA program. [§13.401(a)] The NPRM does not require anyone to have a FOQA program. Neither does the NPRM require a person who has a FOQA program to apply for FAA approval of their program. It appears that a person could have a FOQA program and operate that program without seeking or obtaining FAA approval of that FOQA program, and not be in violation of this or any other FAA regulation.

However, there does seem to be an implied threat by the FAA that if anyone had the temerity to operate a FOQA program independently of the FAA bureaucracy and the agency did not get its way in terms of forcing persons to seek and obtain FAA approval of / or cede control over their FOQA program to FAA that the FAA would engage in some sort of retribution or retaliation – "Nothing in the proposed rule would preclude the FAA from exercising it's subpoena authority,"

More importantly there seems to be a 'back-door' action by FAA to require persons to have a FOQA program, but without going through the regulatory process to establish FOQA as a regulatory requirement. [see also section III infra.] Ostensibly this NPRM is only applicable "to any operator of an aircraft who operates such aircraft under an approved Flight Operational Quality Assurance (FOQA) program." [§13.401(a)] However, that limitation is not part of the FAA's description of the scope of the proposed rule. In describing the proposed rule the FAA states – "The proposed rule would require that an air carrier's FOQA program receive initial and continuing approval from the Administrator. To receive such approval, the rule would require a certificate holder to submit a FOQA Implementation and Operations Plan acceptable to the Administrator." It is incumbent on the FAA to clarify this inconsistency if not inherent contradiction in its description of its proposal before proceeding any further.

And all of this is in the context of an NPRM related to a voluntary program; a program that is not required by any FAA regulation, and a program which can be summarily terminated. The short answer to this incongruity may be that the FAA realizes but is trying to obfuscate the fact that just because the agency may feel FOQA would be or could be useful or might provide the agency with better information does not give FAA the legal authority to issue regulations. **The FAA is only empowered to issue regulations which establish 'minimum standards required in the interest of safety' or 'minimum standards necessary for safety in air commerce'** [49 U.S.C. §44701(a)] Regulatory action by the FAA must meet this statutory standard. Since FOQA is a voluntary, discretionary program it is not and logically cannot be 'a minimum standard' which the FAA is authorized to establish by regulation.

The recently enacted 'Aviation Investment and Reform Act [Pub.Law 106-81] included a provision pertaining to FOQA. This section of the statute directed FAA to "issue a notice of proposed rulemaking to develop procedures to protect air carriers and their employees from enforcement actions (by FAA) that are reported or discovered as a result of voluntary reporting programs such as" FOQA and ASAP. Nothing in this legislation supports this NPRM which would transform voluntary FOQA programs into programs which are required to be submitted to FAA for approval and then requires that such programs must be conducted in accordance with the terms and conditions prescribed by FAA's approval of an 'Implementation and Operations Plan.'

Second, nothing in this legislation supports the FAA's attempt in this NPRM to either seize and acquire FOQA data for itself or control FOQA analysis. [see sections III and IV infra.] The legislation refers to "voluntary reporting programs" not FAA directed programs. Under the guise of this 'procedural' NPRM the FAA is attempting to turn this

legislation upside down, transforming voluntary data collection programs into involuntary programs required to submit data to FAA and provide FAA approved analysis of that data. [see sections II and III infra] Third, the point of this legislation was "to protect air carriers and their employees from enforcement actions" by the FAA. This NPRM turns that premise inside out, focusing on transforming voluntary safety enhancing FOQA programs into a new enforcement tool for FAA prosecutions.

The next question is whether or not the various statutory sections cited by FAA empower or authorize the FAA to promulgate a rule which would require that a voluntarily established program not required by any FAA regulation must be submitted to FAA, approved by FAA, and operated in accordance with FAA's approval.

As presented in this NPRM, the legal references purportedly supporting this NPRM consist of numerous statutory sections. A review of those sections indicates that none of them, not one, provides a valid legal basis authorizing the FAA to take the rulemaking action proposed in this NPRM. Without turning these comments into a legal treatise, a summary of the various statutory references given in the NPRM and their insufficiency vis a vis this NPRM is set out below.

18 U.S.C. 6002 --- statutory authority to grant immunity from prosecution to a person, provided that person is provided with "an order issued under this title" (Title 18 United States Criminal Code) does not provide authority to require that non-mandatory flight operational reports be submitted to FAA or that the FAA has the power to require a program related to the collection of such reports be subject to FAA review and approval in advance.

28 U.S.C. 2461 --- describes the statutory mode for recovery of a civil fine or penalty, and provides that a civil action can be filed in district court to effect such a recovery; while this section provides legal authority to file suit, it does not give FAA regulatory authority to require FOQA data or FOQA programs be submitted to FAA.

49 U.S.C. 106(g) --- statutory delegation of authority for certain specific items from the Secretary of Transportation to the FAA Administrator; does not provide authority to issue regulations.

49 U.S.C. 5121-5124 --- all references are to matters within "this chapter" and this chapter deals with hazardous materials; it has nothing to do with flight operational reports, data or other

information and does not create legal authority to require that flight operational reports or data not required by regulations (i.e., voluntary programs) be submitted to FAA or that such voluntary programs be approved in advance by FAA; 5121 does provide authority to require the production of records, but that is in the context of a subpoena and after an opportunity for a hearing on that production.

49 U.S.C. 40113-40114 --- 40113(a) provides general authority to conduct an investigation; the procedures required to be applied when the FAA initiates an investigation are set out in section 46101 et.seq (investigate when reasonable grounds exist which indicate a person may have violated an FAA regulation, the procedures to be applied in that process – i.e., notice, opportunity for hearing, service of process, etc...); the authority to investigate and conduct that investigation under specific procedures does not constitute authority to issue regulations requiring that a voluntary program which is not mandated by regulation must be submitted to FAA for approval.

--- 40113(b) authorizes FAA to get assistance from NASA, while 40113(c) addresses indemnification of FAA employees

--- 40114 deals with the requirements imposed on FAA in circumstances where the FAA issues reports; it does not provide the FAA with authority to require voluntary, non-mandatory programs be approved by FAA or that data collected by third-parties be submitted to the FAA absent a subpoena.

49 U.S.C. 44103-44106 --- these sections of the statute pertain to the registration of airplanes and airplane components as well as providing the FAA with the authority to revoke the registration of an airplane's certificate // the procedures applicable to revoke a certificate are set out in section 46101 et.seq.; there is nothing in these sections which gives the FAA the power to require that a voluntary flight data collection program be submitted to FAA for approval.

49 U.S.C. 44702-44703 --- 44702 constitutes general authority for the FAA to issue various types of certificates (airman, airplane, airport, air agency, etc...) as well as the form of such

certificates, and provides for the delegation of authority from the FAA to private persons (subsection d); other subsequent sections specifically address particular types and kinds of certificates which FAA may issue – e.g., 44703 specifically deals with airman certificates and authorizes the FAA to specify various terms related to different types of airman certificates; nothing in either section gives the FAA the power to issue a regulation to require a voluntary program being conducted by an air carrier be submitted to FAA for approval.

49 U.S.C. 44709-44710 --- these sections of the statute give FAA the power to reinspect a certificate holder, and to amend, suspend, or revoke a certificate which has been issued, however the person subject to this process is entitled to a hearing before the NTSB; 44710 concerns the revocation of an airman's certificate for a controlled substance violation; neither of these sections authorize the FAA to issue this NPRM which concerns FAA attempting to require that data and information collected via a non-regulatory, voluntary program be done under the control and direction of FAA in the guise of obtaining FAA approval.

49 U.S.C. 44713 --- this section provides that air carriers are to make "any inspection, repair, or maintenance of equipment used in air transportation as required by this part or regulations prescribed or orders issued by the Administrator" FOQA is an information / data collection process which does not involve the 'inspection, repair or maintenance of equipment used in air transportation.' [see e.g., 14 CFR 43.13] More particularly, as a voluntary program FOQA is not required by any FAA regulation or order, and therefore this section does not support this NPRM.

49 U.S.C. 46101-46110 --- these sections describe the procedures to be followed by the FAA in the conduct of an investigation or enforcement action initiated by the FAA; they are procedural in nature and do not vest the FAA with the power to enact substantive regulations. 46101 provides the authority for the FAA to investigate in response to a complaint or when there are reasonable grounds to believe there may be a regulatory violation (since there is no regulation which requires FOQA, there is nothing related to the FOQA program which can constitute a regulatory

violation); the remaining sections (46102-46110) provide for the procedures to be applied by the FAA in conjunction with its investigative process – e.g., service of notice (46103); evidence (46104); filing an action in district court (46106 & 46107); joinder (46109); and jurisdiction in the court of appeals to review an FAA order (44110). None of these procedural sections give the FAA authority to promulgate this NPRM which would require that a voluntary FOQA program which involves flight operational data and information be submitted to FAA for approval.

49 U.S.C 46301-46316 --- this collection of statutory sections covers various diverse subjects, not one of which provides FAA with legal authority to require that voluntary FOQA programs concerning flight operational information be submitted to FAA, nor do they provide FAA with the power to require that the collection of such data or the preparation of reports based on that data is subject to FAA review and approval in advance: 46301 authorizes the FAA to impose a civil penalty for a regulatory violation following notice and an opportunity for a hearing; 46302 subjects persons to a civil penalty for giving the FAA false information; 46303 provides for a civil penalty for carrying a weapon on an airplane; 46304 deals with liens on airplane; 46305 authorizes the filing a civil action to collect a civil penalty [see also 28 U.S.C. 2461 above]; 46306 is specifically applicable only to aircraft not used to provide air transportation, and imposes criminal penalties for false registration; 46307 imposes criminal penalties for violation of national defense airspace; 46308 imposes criminal penalties for interference with air navigation; 46309 imposes criminal penalties for concession and pricing violations such as rebates / 'kick-backs'; 46310 makes it a crime to fail to keep a required report or for falsifying a report or record required to be kept (FOQA is a voluntary, not a required record-keeping program); 46311 makes it unlawful for federal employees to disclose information acquired in the course of inspecting the records of an air carrier; 46312 makes it a crime to willfully / recklessly cause hazardous material to be transported; 46313 provides that a person who refuses to obey a subpoena is subject to imprisonment; 46314 makes it unlawful for a person to enter the designated security area of an airport; 46315 applies to only to aircraft not used to provide air transportation, and imposes criminal penalties for using such an airplane without displaying appropriate navigation

lights while transporting a controlled substance; and finally 46316 provides that if no specific criminal sanction is specified the provisions of Title 18 apply.

49 U.S.C. 46501-46502 --- 46501 provides no authority to issue any regulation, it consists of definitions of terms; 46502 deals with the subject of 'aircraft piracy' and establishes criminal sanctions for such an offense

49 U.S.C. 46504-46507 --- 46504 makes it a crime to assault or otherwise interfere with flight crew members in the performance of their duties; 46505 makes it a crime for a person to attempt to board an airplane with a loaded firearm; 46506 concerns jurisdiction with respect to person who commit criminal acts on airplanes; 46507 provides criminal sanctions for persons who willfully and maliciously provide false information in terms of a threat to civil aviation.

49 U.S.C. 47106 --- this section concerns federal grants for airport development project applications; it has nothing to do with collecting flight operational information or data.

49 U.S.C. 47111 --- this section concerns payments made under or pursuant to federal grants made to airports for airport development

49 U.S.C. 47122 --- this section authorizes the conduct of investigations 'under this subchapter' – i.e., the airport grant program; again it has nothing to do with the collection of operational flight information / data as part of a voluntary FOQA program.

49 U.S.C. 47306 --- this section does not provide authority to issue regulations; it provides that a person who knowingly and willfully violates a regulation prescribed by the Secretary of Transportation is subject to being prosecuted criminally. Since there is no regulation which requires FOQA, this section is not applicable.

49 U.S.C. 47531-47532 --- these sections provide for civil penalty sanctions in the event of a violation of sections 47528, 47529, or 47530, all of which pertain to the operation in the U.S. of aircraft which do not meet stage 3 noise levels and none of them pertain to the collection of 'routine' flight operational data / information under a voluntary, non-mandatory, not-required by any regulation FOQA program.

As is evident from the foregoing brief synopsis of the various statutory sections referred to in the NPRM, none of them, not one, provides a valid legal basis authorizing the FAA to take the rulemaking action proposed in this NPRM. Perhaps the use of a collection of assorted statutory references was intended to obscure the fact that the FAA is devoid of any valid legal basis which could support this NPRM. Whatever the reason, it is unquestionably clear that there is no valid legal basis for this NPRM. The FAA does not have the legal authority to require voluntary, non-mandatory flight operational reports be submitted to FAA, nor does FAA have the authority to require that a voluntary program such as FOQA related to the collection of flight operational data be subject to FAA review and approval in advance. To the contrary, the recent legislation [P.L. 106-81] requires that voluntary programs such as FOQA be protected from the FAA.

It is more than interesting, it is striking to note that one particular statutory reference is not included in the list presented by FAA in support of this NPRM; the missing section is 44701. In issuing this NPRM the FAA appears to have consciously avoided any reference to 49 U.S.C. 44701. This is the statutory provision that specifically authorizes and directs FAA to issue regulations designed to promote safe flight by civil aircraft in air commerce "by prescribing – (1) minimum standards required in the interest of safety....; and (5) regulations and minimum standards for other practices, methods, procedures the Administrator finds necessary for safety in air commerce... [49 U.S.C. §44701(a)] and 49 U.S.C. §44701(b) which authorizes and directs the FAA to "prescribe minimum safety standards for - (1) an air carrier to whom a certificate is issued under section 44705 of this title"

The absence of any reference to section 44701 in this NPRM is perhaps understandable since, as the FAA indicated it recognizes that FOQA is a voluntary program, and consequently it is not a program which comes within the ambit of FAA's regulatory power since it is not within the statutory scope of "minimum standards required in the interest of safety."

II. This NPRM Improperly and Perhaps Illegally Impedes Air Safety

The FAA's proposed action would require FOQA programs to 'receive initial and continuing approval from the Administrator.' The proposed rule provides that "the operator must submit and adhere to a FOQA Implementation and Operations Plan that is

approved by the Administrator." [§13.401(c] In short, under this NPRM the FAA would be exercising control over FOQA. The approval and continuing operation of FOQA would be decided by the FAA; the FAA would be deciding and determining what to include and what to exclude from a FOQA program. And all of this would be done without FAA ever promulgating an NPRM which directly addressed or dealt with FOQA.

One of the values of FOQA is the flexibility that the program provides. Each carrier with a FOQA program has the ability to adjust and shift the focus of their specific FOQA program, including the data collection process, so as to target different specific areas for examination or set different parameters for the examination of the same areas. This NPRM would essentially put FOQA in a straight-jacket -- an FAA bureaucratic one-size-fits-all with everything to be done in the way which FAA deems appropriate. This FAA proposal would essentially destroy one of FOQA's strengths, its flexibility.

Starting from the premise that FOQA is a voluntary program, and according to the FAA in the preamble to this NPRM **"the implementation and continuance of FOQA programs by airlines would be voluntary"** this NPRM defies logic. There is no legal basis for a rule requiring an FAA imprimatur on any non-mandatory program such as FOQA. If a program engaged in by an air carrier is not required to even exist by any FAA regulation, and there are many such programs which are voluntary in nature, the fact of their existence does not vest the FAA with the right to regulate or control such programs.

It is certainly highly inappropriate, and perhaps illegal, for the FAA to attempt to superimpose itself and its bureaucracy on a voluntary air carrier program (i.e., FOQA). In effect the FAA appears to be taking the position that if an air carrier wants to create and implement its own voluntary safety enhancement program (i.e., one that is not mandated or required by any FAA regulation), that the air carrier is precluded from doing so unless or until that voluntary program is submitted to the FAA and has received an imprimatur of approval from the FAA, providing that operation of that program is in accordance with terms and conditions dictated by the FAA and conforms to unspecified FAA criteria. It is astonishing that FAA appears to be taking the position that it is inappropriate for an air carrier to create and implement its own safety enhancement program, and that any such program must be controlled by FAA.

Air carriers have an independent legal obligation 'to provide service with the highest possible degree of safety in the public interest.' [see 49 U.S.C. 44701(d)(1)(A)] This highest possible degree of safety standard is consistent with the common law standard applicable to providing common carriage, however it is in sharp contrast with the statutory standard applicable to FAA which limits FAA's regulatory power to establishing 'minimum standards required in the interest of safety.' [see 49 U.S.C. 44701(a)]

Under this NPRM the FAA proposes to require that FOQA programs have FAA approval. Under this NPRM the FAA would require not only that FOQA programs be initially approved by the FAA, but that such approval would be required to be continuing,

and the implementation of FOQA would be required to adhere and conform to whatever has been approved by the FAA. Carriers would essentially lose the ability to modify, grow, change, adjust the FOQA program to meet their respective individual needs as those needs change. Instead of flexibility there would be suffocation and stagnation from the bureaucratic hand of FAA. Instead of creative and proactive safety analysis FOQA would degenerate and mutate into merely reacting to the issue de jour according to FAA.

The legal problem resulting from this aspect of this NPRM is that this regulatory action by the FAA is interferes with and impedes air carriers in their effort to act in accordance with their duty 'to provide service with the highest possible degree of safety.' This obstructionist NPRM may be more than improper, it may illegally interfere with an air carrier's ability to operate with the highest possible degree of safety by superimposing FAA's bureaucratic view onto what is presently a viable, vibrant, effective, and efficient safety enhancing voluntary program. For example, unless agreed to by the FAA a carrier's effort to used FOQA to monitor fuel efficiency or ATC delays could not be part of the carrier's FOQA program (to avoid embarrassment of FAA); instead the FAA may decide that because one carrier has a particular experience that that item per FAA dictate would become the focus of all FOQA programs even if that situation is not an issue for other carriers. [see sections III and IV infra.]

If the rule proposed in this NPRM were to be established by the FAA that action would restrict the ability of air carriers to implement and operate a FOQA program except as approved by the FAA. That action by the FAA would be inconsistent if not in conflict with the independent responsibility of an air carrier to operate with the highest possible degree of safety by interfering with and impeding an air carrier's efforts to provide service with the highest possible degree of safety.

III. The NPRM is Vague and Ambiguous

The NPRM indicates that in order for a FOQA plan to be approved by the FAA it must have four elements: a plan for collecting and analyzing flight data; procedures for taking corrective action that analysis of the data indicates is necessary; procedures for providing the FAA with aggregate FOQA data; and procedures for informing FAA about corrective actions being taken. [13.401(c)]

All of these elements are procedural in nature. In this NPRM the FAA fails to provide any criteria related to the parameters or flight data elements to be collected or analyzed. Under the proposed rule, a carrier would be required to "submit and adhere to a FOQA Implementation and Operations Plan that is approved by the Administrator. [13.401(c)]. However, there is not a hint as to what is to be in this 'Plan.'

Must the 'Plan' differentiate by type of airplane? Must the 'Plan' distinguish among specific airports? Or specific runways at specific airports? Must the 'Plan' cover

approach speed and/or rate of descent? Must it differentiate by type of approach being flown? Must it cover the relationship between flap setting and speed and rate of descent? What engine parameters are to be recorded? What flight speed parameters are to be recorded? Are take-off and climb speeds to be recorded, and if so, in relation to power setting and flap configuration or not, and by specific airport or just generally? by specific runway? Must the 'Plan' cover departure procedures generally? At different airports? Differentiate departure procedures by specific runway? What constitutes the range of standard operational practices and what constitutes an excursion beyond that range? Are all or only some in-flight events such as autopilot disconnect or TCAS warning or altitude alerts or GPWS warnings to be included?

None of the substantive areas of FOQA are even alluded to in the proposed NPRM.

There is no doubt the FAA intends to require that the 'Plan' have more in it than the four procedurals listed in 13.401(c). However there is not a hint of what is to be in the 'Plan' for it to be acceptable to FAA. In fact FAA refers to an 'advisory circular' to be developed and issued at some time in the future. It appears FAA is trying to use an extra-legal mechanism to create a stealth regulation by this 'back-door' gimmick of 'Plan' approval. The substantive content of FOQA, what is to be covered, reported to FAA, etc... will be in the specifics of the 'Plan' but in this NPRM the FAA discloses nothing about that content, or even what the FAA considers would have to be in a 'Plan' in order to receive FAA approval.

In effect the FAA is trying to generate what appears to be open-ended control of FOQA concealed in the guise of a procedural device. It would be the 'Plan' that would control the content of FOQA programs, but none of the content of the 'Plan' is even hinted at in this NPRM. Then, by asserting the power of 'continuing approval of the 'Plan' the FAA would be able to exercise control over content of the 'Plan' and in effect dictate changes to that content on a whim, with no notice of any kind. This would be in much the same way that the FAA now constantly changes the content of security plans, usually without any valid basis or justification and generally without notice; in the area of security there may be an ostensible, abeit dubious, claim of a need to act quickly to meet a perceived threat, however that claim is not available vis a vis a FOQA 'Plan.'

Because this NPRM provides no information about the content of what the FAA expects to see in a FOQA plan, this NPRM is on its face vague, ambiguous, and lacking in any criteria or standards and therefore impossible for anyone to know what is expected in terms of how to comply. Regulations should be clear, lucid, and explicit. The persons subject to a regulation must be provided with notice of what specifically is expected of them so they can determine how to comply with and conform their actions to what the regulation requires. The FAA provides none of that information in this NPRM. In this NPRM, instead of articulating clear criteria and standards the FAA presents obscure procedural generalizations. To illustrate this point, in FAA's regulations there is a requirement for training programs [see 121.400 et.seq], and there are specific standards and criteria to be met [see FAR Part 121 Appendix E and Appendix F] While FAA approved training programs may and do change in terms of how training is to be

accomplished, the substantive content in terms of standards and criteria reflecting what is to be covered in a training program is specifically described in the regulations. This NPRM provides no specifics, no standards, no criteria.

Another illustration of the vague, ambiguous, and uncertain aspect of this NPRM is found in the proposed regulation itself. Under 13.401(c)(2) a carrier is to have "procedures for taking corrective action that analysis of the data indicates is necessary in the interest of safety." Is this in the carrier's judgment or in the FAA's judgment? What if the carrier and FAA staff or an FAA inspector do not agree on the interpretation or on the analysis of the data? What if there is disagreement as to whether or not any 'corrective action' is necessary? Would a program participant face sanctions because of such a difference of opinion? What elements are to be part of the 'analysis' of data that is to be done in reaching a judgment? Can there be a situation where corrective action is taken not because it is necessary but simply a matter of improving performance?

These are but a few of the myriad questions left unanswered by this vague and ambiguous NPRM. If the FAA wants to establish regulatory control over FOQA the agency may have the power to do so with a properly structured rulemaking. However, this is not such a rulemaking. The FAA indicates that it intends to 'publish an advisory circular which would provide program participants with guidance.' The FAA cannot assert control over the operation of FOQA programs using the gimmick of this vague and ambiguous NPRM to control the content of FOQA 'Plans' by requiring such 'Plans' have continuing FAA approval. Neither can the FAA regulate by 'advisory circular', and in particular the FAA cannot substitute an 'advisory circular' to be issued at some future date as a substitute for specificity in this NPRM.

One of the strengths of FOQA as it exists today is the flexibility available to each carrier to focus on particular flight operational parameters which it considers warrant that attention, and the ability to shift that focus as the need to do so is perceived by the carrier. A corollary benefit is that as different carriers focus their respective FOQA programs on different operational parameters, the sharing of that information provides greater and wider benefits to all carriers. It is a situation where the whole is truly greater than the sum of the individual parts. What is not needed is the imposition of FAA bureaucracy, destroying the flexibility and creativity of FOQA and fashioning a one-size-fits-all straight-jacket. That is particularly inappropriate in the circumstances of this NPRM which provides no specificity, no standards, no criteria, but is merely a vague and uncertain generalized procedure.

IV. There is NO Factual Basis for the Proposed Rule

In the preamble to the NPRM the FAA describes a wide variety of operational benefits which have been realized by different carriers who have implemented voluntary FOQA programs. From a factual perspective this information leads to two obvious conclusions. First, these significant results have been achieved without the benefit or guidance or

'oversight' or direction and control being exercised by the FAA. Second, it is clear that the FAA has been provided with the results of the various FOQA programs. It is this latter point which is the focus of this portion of these comments.

The various descriptions in the preamble to the NPRM clearly demonstrate that the FAA has been provided with aggregate FOQA data. That is the only way the FAA would be in a position to present its observations and conclusions about the value and benefits of FOQA involving subjects such as the frequency of approaches where the descent rate exceeds 1000 feet per minute at the 500 foot descent height, or the relationship between specific airport locations and the frequency of unstable approaches, or an anomaly in the autothrottle performance on a particular aircraft type. As the FAA notes in the preamble there is a lengthy list of actual and potential FOQA benefits. **The point is that the only way the FAA would be aware of the various benefits that have already resulted from the implementation of FOQA is because the FAA is being provided with access to aggregated FOQA data. Therefore, since the FAA is already privy to and being provided with aggregated FOQA data, there is no valid factual basis for this proposed rule.**

In the preamble to the NPRM the FAA indicates that "The aggregate FOQA data would be reviewed by various organizational elements within the FAA to identify trends pertinent to the areas of safety oversight or NAS management for which they are responsible." The FAA then goes on to indicate that the "information obtained from aggregate FOQA information would be used to provide an improved basis for agency decisions based on objective data from line operations."

Those representations are belied by three items: first, as already indicated the FAA is apparently already receiving aggregate FOQA data. Second, the proposed rule would require participants in the program to analyze their collected data and provide the FAA with the results of their analysis. [13.401(c)] If the aggregated data is to be collected and provided to the FAA, there is no reason for a rule which requires the providers of that data to engage in analysis in accordance with the FAA designated and approved 'Implementation and Operations Plan.' Presumably it would be the FAA which is going to analyze the aggregated FOQA data – at least that is why the FAA says it wants access to the aggregate FOQA data.

Parties who have a FOQA program in place clearly already also have in place a system for review and analysis of that data. Consequently, there is no reason for an FAA regulation requiring they have a system for review and analysis unless: (a) the FAA has no intention of conducting its own review or analysis of this data; and/or (b) the FAA wants to exercise control over and impose its bureaucratic whims on the analysis and evaluation being conducted by parties who have FOQA programs to require them to do only that analysis and evaluation of data which the FAA wants.

The FAA acknowledges that FOQA is a viable, efficient, and effective voluntary program. Apparently the FAA is interested in seizing control of this program. It seems to be the FAA position that it is inappropriate for an air carrier to create and implement

its own voluntary safety enhancement program. Exhibiting an almost classic Not Invented Here syndrome, apparently every program must be dictated and controlled by FAA.

Third, and this item significantly undermines FAA's credibility, under the proposed rule the FAA is not trying to gain access to aggregated FOQA flight operational data in order to enhance the agency's understanding of events or analyze trends, or even collect information so as to improve the FAA's decision-making process. Proposed section 13.401(d) would require that 'aggregate FOQA data' be provided to the FAA. However, under section 13.401(e), FOQA data, which is defined as 'any raw data that has been collected' is to be provided to the FAA, and this data the FAA indicates it would use in conjunction with what the FAA refers to as its 'punitive or remedial enforcement activity.'

Despite all the various protestations and claims to the contrary that the agency does not intend to and would not use FOQA for the purpose of imposing enforcement sanctions, it appears that the real reason for seeking access to FOQA data, specifically the raw data, is to apply that data in conjunction with the FAA's punitive programs. If this were not the case, and if the FAA was truly interested in simply obtaining aggregate FOQA data in order to identify trends pertinent to the areas of safety and provide an improved basis for agency decisions based on objective data from line operations, there would be no reason for the FAA to try to gain access to FOQA 'raw data'.

For all of the foregoing reasons this NPRM should be withdrawn.

Advocates for Legitimate and Fair Aviation Regulations